

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOUGLAS CHEEK)	
Claimant)	
VS.)	
)	
UNITED PARCEL SERVICE)	Docket No. 198,330
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from an Award entered by Assistant Director David A. Shufelt on May 31, 1996. The Appeals Board heard oral argument on November 7, 1996.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared for the claimant. Fredrick Greenbaum of Kansas City, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Award and has reviewed and considered the record listed in the Award.

ISSUES

The sole issue to be considered on appeal is the nature and extent of claimant's disability. The Assistant Director awarded benefits for a 68 percent work disability. Respondent contends that claimant's decision to go to nursing school should render him ineligible for work disability and the Award should be based on functional impairment only.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds claimant should be awarded benefits for a 68 percent work disability and the decision by the Assistant Director should be affirmed.

The parties stipulated that claimant met with personal injury by accident arising out of and in the course of his employment with respondent on October 21 and October 30, 1994. Both injuries were to claimant's low back. Claimant was treated conservatively by several physicians, including Dr. Poole. Dr. Poole gave claimant permanent restrictions of no bending or stooping and no lifting greater than 25 pounds. Respondent was unable to accommodate the restrictions and claimant was unable to return to employment at a wage of 90 percent or greater than the preinjury wage. As a result, he is entitled to work disability. K.S.A. 44-510e.

The work disability definition found in K.S.A. 44-510e(a) is as follows:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

The Assistant Director concluded claimant had lost 55 percent of his work task performing ability. This conclusion was based upon the opinion of Dr. Schlachter from a list of tasks prepared by Mr. Jerry Hardin. This was the only task loss opinion included in the record. The Assistant Director found it credible and the Appeals Board agrees. The Appeals Board, therefore, adopts the finding that claimant sustained a 55 percent loss of ability to perform those tasks he performed in his 15-year work history.

The Assistant Director also concluded there was an 81 percent difference between the wage claimant was earning at the time of the injury and the wage he was earning after the injury. As previously indicated, claimant was unable to return to work for respondent. Instead claimant took the part-time position as a Pizza Hut delivery driver while he also attended classes at Wichita State University to obtain his nursing certificate. Respondent

argues that by returning to school claimant has taken himself out of the labor market and that he should not, therefore, be eligible for work disability. Following the rational of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), claimant may be ineligible for work disability if he refuses to accept an offer of accommodated employment which is within his or her work restrictions. The Appeals Board does not consider claimant's decision to return to nursing school and work part-time to be conceptually equivalent to refusing an offer of accommodated employment. The respondent has an option to offer claimant an accommodated position and also the option to offer vocational retraining. Claimant's decision to undergo retraining at his own expense should not be treated as conduct inconsistent with the purpose of the Workers Compensation Act.

The Appeals Board, therefore, agrees with and affirms the finding that claimant had an 81 percent wage loss. This finding is based on testimony that claimant worked six hours per week at \$4.60 while delivering pizzas giving a \$27.60 per week wage compared to his wage at the time of the injury of \$143.07. The Appeals Board notes there is a typographical error in paragraph 6 of the Award indicating that claimant had a \$145 per week job post injury.

Therefore, the Appeals Board finds the decision by the Assistant Director should be affirmed in all respects. The Appeals Board adopts as its own the findings and conclusions stated by the Assistant Director in the Award of May 31, 1996 with the noted exception of the typographical error in paragraph 6.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director David A. Shufelt dated May 31, 1996, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Douglas E. Cheek, and against the respondent, United Parcel Service, and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred October 21, 1994, and based upon an average weekly wage of \$143.07 for 13.86 weeks of temporary total disability compensation at the rate of \$95.38 per week or \$1,321.97, followed by 282.20 weeks at the rate of \$95.38 per week or \$26,916.24, for a 68% permanent partial general body disability, making a total award of \$28,238.21.

As of December 20, 1996, there is due and owing claimant 13.86 weeks of temporary total disability compensation at the rate of \$95.38 per week or \$1,321.97, followed by 99.14 weeks of permanent partial compensation at the rate of \$95.38 per week in the sum of \$9,455.97 for a total of \$10,777.94, which is ordered paid in one lump sum

less any amounts previously paid. The remaining balance of \$17,460.27 is to be paid for 183.06 weeks at the rate of \$95.38 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Stephen A. McManus, Kansas City, KS
David A. Shufelt, Assistant Director
Office of Administrative Law Judge, Wichita, KS
Philip S. Harness, Director